UNITED NATIONS

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.1
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 1st MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Tuesday, 16 June 1998, at 10 a.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

Agenda item		*Paragraphs*
-	Opening of the session	1
-	Election of officers	2-5
-	Organization of work	6
11	Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997	7-83

This record is subject to correction.

Corrections should be submitted in one of the working languages, set forth in a memorandum and/or incorporated in a copy of the record. They should be sent under the signature of a member of the delegation concerned to the Chief of the Official Records Editing Section, Room DC2-750, United Nations, New York.

In accordance with the rules of procedure for the Conference, corrections may be submitted within five working days after the circulation of the record. Any corrections to the records of the meetings of the Committee of the Whole will be consolidated in a single corrigendum.

V.98-57454 (E)

99-80876

The meeting was called to order at 10.20 a.m.

OPENING OF THE SESSION

1. **The CHAIRMAN** declared open the first meeting of the Committee of the Whole and welcomed participants. He paid a tribute to Mr. Adriaan Bos, Chairman of the Preparatory Committee, for his outstanding contribution to the process that had culminated in the Conference and conveyed to him the Committee's best wishes for a prompt recovery.

ELECTION OF OFFICERS

2. **The CHAIRMAN** said that Ms. Fernández de Gurmendi (Argentina), Mr. Mochochoko (Lesotho) and Mr. Ivan (Romania) had been nominated as Vice-Chairmen.

3. *Ms. Fernández de Gurmendi (Argentina), Mr. Mochochoko (Lesotho) and Mr. Ivan (Romania) were elected Vice-Chairmen by acclamation.*

4. **The CHAIRMAN** said that Mr. Nagamine (Japan) had been nominated for the office of Rapporteur.

5. *Mr. Nagamine (Japan) was elected Rapporteur by acclamation.*

ORGANIZATION OF WORK

6. **The CHAIRMAN** stressed the need for effective, transparent working methods, involving working groups and informal consultations in dealing with the more sensitive substantive articles of the Statute that still required considerable negotiation, and for flexibility in the planning and execution of the work programme.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.2 and L.3)

7. **The CHAIRMAN** suggested that the Committee should first hear the introduction to Part 1 of the Statute by the coordinator of that Part, without a discussion, and then proceed to hear the introduction to Part 3, followed by a discussion.

8. *It was so agreed.*

9. **Mr. RAMA RAO** (India), introducing Part 1 of the draft Statute, said that that Part, covering articles 1 to 4, was not one of the more sensitive, substantive parts of the draft and had not given rise to many differences of view. One outstanding issue, however, was the location of the Court, contained in article 3, which was a policy matter that would require a subsequent political decision.

10. Article 1, a standard provision, differed from that contained in the draft Statute prepared by the International Law Commission (ILC) to the extent that, on a Norwegian proposal and following informal consultations and agreement, it included a very general reference to the concept of complementarity, in order to meet certain concerns about the symbolism and image of the very first article of the draft Statute. The *nota bene* appended to that article

drew attention to the need to maintain drafting consistency throughout the Statute, a point to be borne in mind by the Drafting Committee.

11. Although article 2 on the relationship of the Court with the United Nations was a standard provision that had been left unchanged throughout the drafting process, it contained implicit issues of policy and substance, notably the questions of the Assembly of States Parties and of the financing of the Court, which were dealt with in Parts 11 and 12 of the draft Statute.

12. Except on the question of the seat of the Court, there had been general agreement on article 3.

13. Article 4, which had evolved during the drafting process, was an umbrella provision upon which agreement had been reached, establishing in generic terms the international legal personality of the Court and such functional legal capacity as might be necessary, while the specifics of legal personality and questions such as immunities, privileges and structures were dealt with elsewhere in the body of the draft Statute.

14. Subject to any unexpected changes of position, he believed that there was no need for any further consultations on Part 1, which, after a decision by the Committee, could be referred to the Drafting Committee.

15. **Mr. SALAND** (Sweden), introducing Part 3 of the draft Statute, "General principles of criminal law", said that the articles under Part 3 fell into three categories, those—the majority—which clearly needed more work by legal experts in a working group setting because legal problems had not been analysed in sufficient depth or there was a need for substantial redrafting, those which were ready for the Drafting Committee after a brief discussion, and those which, as a whole or in part, would not benefit from any further technical discussion because they were ripe for bold political decisions; they were those for which an "either/or" option was presented.

16. Article 21 was clearly a case for working group treatment because, although there was agreement on substance, a thorough analysis was still needed on how the principle of *nullum crimen sine lege* would apply to the different types of crimes under the Statute and because there was considerable room for improvement in the drafting.

17. Similarly, more work was needed on article 22, although, again, there was agreement on substance.

18. Under article 23, a major political issue on which political guidance from the Committee was needed was raised in paragraphs 5 and 6, namely, whether legal persons, corporations or criminal organizations, as well as natural persons, should have individual criminal responsibility. Other parts of the article needed further substantive and drafting work. One particular thorny issue was the problem of conspiracy covered by paragraphs 7 (d) and (e) (ii), although he hoped that use of the compromise language of the recently adopted International Convention for the Suppression of Terrorist Bombings might help solve that problem. Finally, as indicated in the *nota bene*, the working group would need to check the references to the mental element in that article; since a position of principle was taken on the *mens rea* in article 29, the general intent would be covered by that article, without any need for mentioning it under article 23. He accordingly suggested that, after a discussion in the Committee, and, if possible, with the Committee's political guidance on the question of legal persons, the article might be referred to the working group.

19. He hoped that the Committee would be able to take a prompt decision on article 24, which was clearly ready for referral to the Drafting Committee. To his mind, it was immaterial whether the two bracketed words were included or deleted.

20. Article 25 referred to the basic question whether responsibility should extend to military commanders only or to any superior, including civilians. Some political guidance was needed from the Committee in that respect, and once that issue was solved, much of the drafting could readily be dealt with in a working group setting.

21. Article 26 also concerned a difficult issue. There seemed to be a trend in favour of a relatively high age of responsibility. Some interesting ideas had been put forward about dealing with the matter as a jurisdictional rather than a responsibility issue in the traditional way. A brief debate might give some political guidance on the age-limit question, but the article also needed further consideration in a working group context.

22. Political guidance was also needed on article 27, since the basic question was whether a statute of limitations was included or not. Once that was determined, the drafting could be left to a working group.

23. Under article 28, the role of omission in creating criminal responsibility under the Statute raised difficulties because of the very different approaches in the various legal systems. Clearly, more debate was needed among legal experts in the working group or subsequently even in informal consultations.

24. Article 29, which had been the subject of extensive debate in the Preparatory Committee, was a key article and had a bearing on article 23 as well as, for instance, on the definition of genocide. He suggested that article 29, as it stood, might be ready for adoption and forwarding to the Drafting Committee, but submitted that, since the bracketed words "[or omission]" in paragraph 2 (a) referred to the problems arising under article 29, it would be pointless to attempt to solve the problem twice over. The problem might be solved by replacing the words "act [or omission]" in paragraph 2 (a) of the article by "conduct", and by deleting paragraph 4, since it proposed a definition of "recklessness"—a concept which appeared nowhere else in the Statute and was therefore superfluous.

25. The basic question in article 30 was whether both concepts—mistake of fact and mistake of law—should be grounds for excluding criminal responsibility. Since both substantive and conceptual differences were involved, the question needed further discussion among experts in a working group setting.

26. There was now agreement on the use of the term "grounds for excluding criminal responsibility" rather than the term "defences" in the long and difficult article 31. The difficulty in that article and those which followed lay in the very substantial conceptual differences in various legal systems over the definition of such terms as "self-defence" and "necessity". More discussion among legal experts was obviously needed and he therefore urged those interested in the issue to engage in consultations, particularly on paragraphs 1 (c) to (e), so as to assist the working group.

27. Article 32 also clearly required further working group discussion by legal experts.

28. Article 33 was something of an anomaly in that there had never been any textual proposal for the article. It had originally dealt with defences under public international law, such as self-defence under article 51 of the United Nations Charter. There seemed to be growing agreement that the article was not really needed, but he would be willing to continue discussions, perhaps informally, on how to approach it. A focused discussion would be difficult at the current stage, particularly as the issue was also related to the definition of crimes, and he would therefore suggest returning to it at a later stage.

29. With reference to article 34, in most legal systems there would be a multitude of other grounds for excluding criminal responsibility, some perhaps not even defined; however, for the purposes of the Statute, a "basket" would need to be determined, which could best be done in a working group.

30. Summing up, he suggested that the Committee might wish to focus its discussion on the articles he had indicated as being ready for referral to the Drafting Committee, without prior discussion in a working group setting, especially articles 24 and 29, and on those on which political guidance would be needed, namely article 23, paragraphs 5 and 6, article 25, article 26 and article 27. To save time, the remaining articles should be referred to the working group.

31. **The CHAIRMAN** said he took it that that suggestion was acceptable, on the understanding that all articles except those referred to the Drafting Committee would be extensively discussed in the working group, without the need for enunciating political positions.

Article 23

Proposal submitted by France (A/CONF.183/C.1/L.3)

32. **Ms. LE FRAPER DU HELLEN** (France), referring to article 23, paragraphs 5 and 6, which introduced the concept of the criminal responsibility of legal persons, said that the inclusion of such a concept in the Statute had met with resistance on the part of many delegations on the grounds that either the legal systems of their countries did not provide for such a concept or that the concept was difficult to apply in the context of an international criminal court. While understanding that argument, France felt that the Statute should go at least as far as the Nuremberg Charter, which had provided for the criminal responsibility of "criminal organizations"; her delegation was therefore proposing the replacement of the existing paragraphs 5 and 6 by the text before the Committee.

33. The French proposal, which had already been submitted to the Preparatory Committee, was based on five principles. Firstly, the responsibility of a group or organization must be consequent on the previous commission by a natural person of a crime falling within the jurisdiction of the Court. The criminal responsibility of natural persons would not, therefore, be completely dissociated from that of the organization, and the criminal responsibility of criminal organizations clearly did not exclude that of natural persons. There was nothing in the proposal to permit the concealment of individual responsibility behind that of an organization. The second principle, stated in the proposed new paragraph 5, corresponded to a provision in the Nuremberg Charter. The third principle, that a decision by the Court on the criminal nature of an organization was binding on States parties and could not be questioned, would certainly require further discussion. Fourthly, the principle that it was for States parties to take the necessary steps to give effect to a Court decision to declare that a group or organization was criminal, was also similar to a provision of the Nuremberg Charter. The fifth principle, to which her delegation would return during the discussion on penalties, was that organizations declared criminal by the Court might incur penalties. France proposed that only fines or confiscation of the proceeds of crimes should be imposed. The purpose of her delegation's proposal was to build a bridge between the countries that accepted criminal responsibility for organizations or groups and those that did not.

34. **Mr. SADI** (Jordan) expressed support in principle for the French proposal and agreed that organizations behind a criminal act under the Statute should be held responsible and accountable, and also punishable where possible, although he doubted whether the Committee itself could agree on the wording.

35. **Mr. JENNINGS** (Australia) said that his delegation was prepared to discuss the interesting proposal with the French delegation. However, although the criminal responsibility of organizations was recognized under domestic criminal law in his country, that was not the case in all countries, and Australia's doubts about the enforcement of any finding of criminal responsibility in relation to organizations remained.

36. **Mr. HU Bin** (China) noted that the criminal responsibility of legal persons was reflected in the law of many countries, but urged caution in incorporating such criminal responsibility within the Statute of an international court, and especially in extending the scope of the criminal responsibility of legal persons because of the sensitive political issues involved. In references to the Nuremberg Charter and Tribunal, the Tribunal itself, the specific historical background and the special characteristics of those trials should be taken into account. The inclusion in the Charter of provisions whereby the Tribunal would declare an organization criminal and the fact that it had acted on such provisions had not been intended as a means of prosecuting legal persons or organizations as such. It had, rather, been a special procedure according to which the States concerned, acting upon the Tribunal's declaration, had prosecuted and tried individuals belonging to the organizations declared to be criminal. In the Nuremberg trials, those organizations themselves had not been subject to criminal punishment and the charges had been brought on grounds of individual responsibility. It should also be borne in mind that the trials had been conducted by victorious over defeated countries. The International Criminal Court under discussion would be established against the background of a complex international political situation that differed sharply from the situation prevailing in 1945. He would therefore be in favour of deleting paragraphs 5 and 6.

37. **Mr. KROKHMAL** (Ukraine) said that the French proposal was of great interest to Ukraine, which was prepared to discuss that and any other proposals along similar lines. He was concerned, however, about the implementation of the Court's decision in countries in which the responsibility of criminal organizations was not covered by domestic law, and also about the implications for the fundamental principle of complementarity on which the Statute was built. If paragraphs 5 and 6 were maintained, in whatever form, did that mean that the procedures of countries which could not comply with paragraphs 5 and 6 because their domestic law did not provide for the criminal responsibility of organizations would be considered ineffective or non-existent within the meaning of the complementarity principle?

38. **Mr. QUIROZ PIREZ** (Cuba) said that the French proposal required further thought because, although his country's legislation accepted the concept of the criminal responsibility of legal persons, the inclusion of such a concept in the Statute of the Court might raise serious problems, in terms of complementarity, for countries that did not. The introduction of the term "criminal organizations" would further raise the question of the interpretation and definition of the terms "legal person" and "criminal organization". He agreed that the Nuremberg Charter and Tribunal must be considered in their historical context. That Tribunal had been created *ex post facto*, at a time when the criminal organizations in question had been identified and accepted as such and had accordingly required no further definition, whereas the International Criminal Court would be working on a permanent basis to judge acts occurring after its establishment. An accepted, lasting definition of the term would therefore be needed.

39. **Mr. GUARIGLIA** (Argentina) said that his delegation had initially been in favour of the deletion of paragraphs 5 and 6 because the International Criminal Court was a body directed towards determining individual criminal responsibility. The introduction of the concept of the responsibility of legal persons had proved highly controversial when it had been discussed in the Preparatory Committee and a decision by the Court pursuant to those paragraphs would be very difficult to enforce. However, the French proposal was an interesting one and warranted discussion since it appeared to solve the problem of implementation of the Court's decision by transferring responsibility for implementation to the States parties. It should be noted that in doing so, it would add to the latter's obligations. He agreed with the Cuban contention that a precise definition of a "criminal organization" would be needed.

40. **Mr. YAMAGUCHI** (Japan) said that his delegation's position was flexible. However, in terms of the punishment of a criminal group, the introduction of the criminal organization concept proposed by France was very welcome. The matter should be further discussed in a working group context.

41. **Mr. MANSOUR** (Tunisia), welcoming the French proposal, asked whether the criminal organizations in question would be subject to penalties apart from forfeiture of property.

42. **Mr. ONWONGA** (Kenya) welcomed the French proposal, which warranted further discussion, notably on enforcement machinery. The existence of legal persons was accepted in all legal systems. Enforcement would depend on who was behind the act in respect of which a complaint had been lodged under the Statute. If an individual were identified, it would be that individual who would appear on behalf of the legal person, the latter being clearly an artificial creation. Certain organizations that did not have legal status could be regarded as merely providing a cover name under which the individuals were operating, so that those individuals could be held personally liable.

43. **Ms. BERGMAN** (Sweden) said that her delegation opposed the inclusion in the Statute of the criminal responsibility of legal persons, because the underlying idea of the International Criminal Court was individual responsibility for criminal acts. The proposal also raised such practical problems as ascertaining who would represent the legal person and what would happen if the representative of the legal person was a natural person who was also indicted for the same act. On the latter assumption, what would be the position if the legal person and the natural person had different interests, and also if the legal person closed down its activities in order to escape criminal responsibility? Such problems would not be solved in a few weeks. With regard to the French proposal, Sweden shared the concerns of other States about problems of enforcement and complementarity.

44. **Mr. HAMDAN** (Lebanon) said that his delegation would have great difficulty in accepting the French proposal because the crimes concerned were of a specific and, mostly, political nature and the crimes to be embodied in the Statute were still not clearly defined. Since the responsibility of States had been excluded from the Statute, the criminal responsibility of legal persons must likewise be excluded, and responsibility must be restricted to individuals. The political implications of the French proposal would raise difficulties that could not be resolved in the short time available, not to mention the very significant practical problems referred to by other speakers.

45. **Mr. YEE** (Singapore) said he shared the conceptual difficulties of other delegations in following the Nuremberg model. He would rather keep the existing paragraphs 5 and 6, establishing criminal responsibility for legal persons in the same way as for individuals, than adopt the approach of a blanket declaration that an organization was criminal and using that as a basis for the treatment or trial of individuals. The separate treatment of organizations and individuals raised various problems. For example, did the declaration of an organization as criminal subject it to a different regime in relation to certain procedural safeguards built into various parts of the Statute? Several elements of paragraph 6 referred to in the French proposal, especially in relation to the recognition and enforcement of judgements, had counterpart provisions in Part 10 of the draft Statute; closer scrutiny was therefore warranted.

46. **Ms. FLORES** (Mexico) said that the Court's jurisdiction should extend solely to natural persons, as had always been the understanding; indeed, article 1 of the Statute should be amended to make that clear. The proposed provision to the effect that the Court would determine when a natural person was acting on behalf of a criminal organization would require the establishment of exhaustive standards in order to comply with the principle of *nullum crimen sine lege*. Furthermore, it would be very difficult for States, especially those in which there was no legal provision for the criminal responsibility of legal persons, to implement a Court decision pursuant to such a provision. Shifting the problem to national legislations would compound the difficulties for States. For practical reasons, therefore, she did not support the French proposal. If delegations considered it important to include the

criminal responsibility of criminal organizations in the Statute, a special chapter would be needed, which would be impracticable at so late a stage in the proceedings.

47. **Mr. NIYOMRERKS** (Thailand) said that the reference to "legal persons" and then "agencies" in the existing paragraph 5 of article 23 was ambiguous and open to different interpretations, raising, for instance, the question of hierarchy in governmental agencies already dealt with in article 25. It would be difficult to adjudicate cases involving legal persons and to impose penalties on such organizations, and the definition of legal persons would vary from one legal system or country to another. Thailand therefore proposed the deletion of paragraphs 5 and 6.

48. With respect to the French proposal, he foresaw difficulties in ascertaining which crimes constituted organized crime or which organizations would be deemed criminal; that would also complicate burden-of-proof requirements.

49. Thailand advocated the inclusion of the crime of trafficking in narcotic drugs in the jurisdiction of the Court and consequently saw the merit of discussing the question of organizations committing such crimes at a later stage in the proceedings.

50. **The CHAIRMAN**, summing up the discussion, said that there seemed to be general agreement on the importance of the problem caused by criminal organizations and that most delegations recognized that the French proposal was an improvement over the existing text and warranted some discussion in the working group. Many delegations had difficulty in accepting any reference to "legal persons" or "criminal organizations", the reasons given being the problem of implementation in domestic law, the difficulty of finding acceptable definitions, the implications for the complementarity principle, the possible creation of new obligations for States, and the challenge to what was considered the exclusive focus of the Statute, namely individual criminal responsibility. It had been suggested that article 1 should be more explicit on that subject, and that a distinction should be drawn between the inclusion of the responsibility of criminal organizations in the Nuremberg Charter and the purpose pursued in the Statute of the International Criminal Court. It was clear that, whatever the ensuing debate, the matter would be discussed further in the working group.

51. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) expressed misgivings about extending the concept of individual criminal responsibility to legal persons, because not all legal systems accepted that concept and because the purpose of the Court was to bring to justice natural persons responsible for crimes. He was not sure that replacing the term "legal persons" by "criminal organizations" would solve the problem. He reserved his detailed comments for discussions in the working group.

52. **Mr. MANONGI** (United Republic of Tanzania) said that paragraphs 5 and 6 should be retained as they stood, rather than the more broadly worded French proposal. To take a specific example, one of the allegations concerning the genocide in Rwanda was that there had been companies in whose warehouses arms bought with the profits of those companies had been stored and from which they had been distributed, with the full knowledge of the representatives of those companies. Tanzania believed, therefore, that not only should criminal responsibility be attributed to representatives in their individual capacity, but that the entity itself should be held criminally liable, if only by paying fines or by being liquidated.

53. **Mr. KERMA** (Algeria) said that the French proposal was extremely interesting but needed more in-depth discussion in order to clarify certain aspects of the criminal responsibility of criminal organizations.

54. **Mr. HARRIS** (United States of America) said that his delegation generally endorsed the comments made by the representatives of Sweden, Australia and Singapore. The United States did not necessarily agree that the French proposal, which was broader than the current text, would eliminate the problems in that text; indeed it might create more. His delegation would work towards an acceptable definition of the concepts involved and the establishment of a clear standard of proof in respect of legal persons or criminal organizations, but considered that it would be difficult to reach consensus. Failure to reach consensus must be readily acknowledged in view of the time constraints, and would not in any event seriously undermine the effectiveness of the Court.

55. **Mr. SKIBSTED** (Denmark), speaking also on behalf of the delegation of Finland, shared Sweden's scepticism about the inclusion in the Statute of the criminal responsibility of legal persons. Denmark's view in principle was that the emphasis in the Statute should be on individual responsibility and that the extension of such responsibility to legal persons would complicate matters unduly, especially with regard to national implementation.

56. **Mr. AL-CHEIKH** (Syrian Arab Republic) advocated the deletion of paragraphs 5 and 6 because of the inherent contradiction between the accepted position that States, though legal persons, could not be held criminally responsible and the proposal that other legal persons should be prosecuted. Incorporating the concept of the criminal responsibility of legal persons or criminal organizations into the Statute could create more problems than it resolved, notably in terms of the relevant definitions. The provisions of article 23, paragraph 7, concerning the criminal responsibility of persons aiding and abetting others in committing crimes, would cover the commission of crimes as a whole.

57. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that she did not in principle see the need for establishing the principle of criminal responsibility of legal persons under the Statute of the International Criminal Court, not because Greek law did not provide for the criminal responsibility of such persons, but because there was no criminal responsibility which could not be traced back to individuals. Moreover, she was unconvinced by the argument concerning the precedent set by the Nuremberg trials, since the legal context had been very different.

58. **Ms. ASSUNÇÃO** (Portugal) endorsed the comments made by Greece and Mexico, especially with reference to the principle of *nullum crimen sine lege*. Her delegation would be interested in discussing the issue further in the working group.

59. **Ms. MEKHEMAR** (Egypt) concurred with those who had referred to the legal difficulties involved. In her view, the criminal responsibility of natural persons might cover that of legal persons, so that the criminal responsibility of legal persons should not be included in the draft Statute. Paragraphs 5 and 6 should be deleted. Although the French proposal was an improvement on the existing text of paragraphs 5 and 6, it did not solve the underlying problems and accordingly did not warrant support.

60. **Ms. FRANKOWSKA** (Poland) said she shared the views of Australia, Argentina and Sweden and favoured the deletion of paragraphs 5 and 6. The emphasis in the Statute was on individual criminal responsibility and any extension to legal persons would change its character and would, moreover, raise insurmountable problems in regard to evidence. Substituting "criminal organizations" for "legal persons" would, if anything, be prejudicial, to the extent that it would introduce the vague concept of a "group". She also saw inconsistency between acceptance of the responsibility of an organization or group and non-acceptance of the responsibility of States: where would the line be drawn, for example in the case of a one-party Government?

61. **Mr. PENKO** (Slovenia) said that if any proposal along the lines of the French draft were accepted, additional provisions would be needed, and not merely one or two paragraphs. Slovenia, for example, had recently

introduced the criminal responsibility of legal persons, with some forty provisions on the subject. In view of the time constraints, the only rational solution would be to delete any reference to the criminal responsibility of legal persons and leave the question to future legislators to decide.

62. **Mr. Tae-hyun CHOI** (Republic of Korea) expressed support for the French proposal, on condition that the provisions concerning the criminal responsibility of legal persons were strictly limited to two types of penalties—fines and confiscation. In view of the broad scope of the French proposal, more concrete requirements for the punishment of legal persons or criminal organizations should be specified, as should the relationship of the crime to the business carried out by the legal person and the degree of its involvement in the crimes in question.

63. **Mr. KELLMAN** (El Salvador) said that, although national legislation in his country provided for the criminal responsibility of legal persons and criminal organizations, he was not in favour of retaining paragraphs 5 or 6. For the reasons given by Mexico, he opposed the French proposal.

64. **Mr. ASSHAIBANI** (Yemen) said that he would have difficulty in accepting the French proposal and joined others in seeking the deletion of paragraphs 5 and 6 because of the many difficulties involved in introducing and defining the concept of legal persons or criminal organizations.

65. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) said that, although the matter could be given further thought at a later stage, the criminal responsibility of legal persons should not be included in the Statute at the current juncture because of the difficulties arising over definition, interpretation and enforcement. Moreover, since many legal systems had no provision for the concept, its inclusion might discourage accession to the Statute.

66. **The CHAIRMAN** said that the debate confirmed the substantive difficulties involved in addressing the criminal responsibility of criminal organizations and said that the matter would now be referred to the working group for consideration.

Article 25

Proposal submitted by the United States of America (A/CONF.183/C.1/L.2)

67. **Ms. BOREK** (United States of America), introducing the draft proposal, said that her delegation had had serious doubts about extending the concept of command responsibility to a civilian supervisor because of the very different rules governing criminal punishment in civilian and military organizations. Recognizing, however, that there was a strong interest in some form of responsibility for civilian supervisors, it was submitting a proposal in an endeavour to facilitate agreement. The main difference between civilian supervisors and military commanders lay in the nature and scope of their authority. The latter's authority rested on the military discipline system, which had a penal dimension, whereas there was no comparable punishment system for civilians in most countries. Another difference was that a military commander was in charge of a lethal force, whereas a civilian supervisor was in charge of what might be termed a bureaucracy. An important feature in military command responsibility and one that was unique in a criminal context was the existence of negligence as a criterion of criminal responsibility. Thus, a military commander was expected to take responsibility if he knew or should have known that the forces under his control were going to commit a criminal act. That appeared to be justified by the fact that he was in charge of an inherently lethal force.

68. Civilian responsibility as proposed in paragraph (2) of the draft was set forth according to a similar basic structure as for military responsibility, with some differences. One was that the superior must know that

subordinates were committing a criminal act. The negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility. In addition, civilian supervisors were responsible for their subordinates and the latter's acts only at work and not for acts they committed outside the workplace in their individual capacity, whereas military commanders were responsible for the forces under their command at all times. Lastly, the provision regarding the ability of the supervisor to prevent or repress the crimes took into account the very different nature of civilian accountability mechanisms and the weak disciplinary and administrative structure of civilian authority as opposed to that of the military. In some Governments with well-developed bureaucracies, it was not even possible to dismiss subordinates, and enforcement might be difficult even if they were suspended.

69. **Mr. van der WIND** (Netherlands) endorsed the United States proposal. His delegation proposed in turn to replace the words "intending to" in subparagraph (a) of the existing article 25 by "about to". That terminology was similar to that of the Additional Protocols to the 1949 Geneva Conventions, with which the Netherlands would like to ensure the greatest possible consistency, especially with regard to command responsibility. He understood from informal consultations that there was some support for such an amendment. The text of the existing subparagraph (a) would accordingly read: "The commander either knew, or should have known, that the subordinates were committing or about to commit such crimes;".

70. **Mr. MANSOUR** (Tunisia) said that article 25 was to some extent a repetition of paragraph 7, subparagraphs (b) and (c) of article 23, and therefore suggested that it should be deleted.

71. **Mr. de KLERK** (South Africa) expressed support for the United States proposal, subject to one comment and a proposed amendment. A commander could have either operational, administrative or complete command. Clearly the reference in article 25 was to operational or full command; he therefore suggested that that aspect should be reflected in the text by substituting "operational commander" for "commander" wherever it occurred and, in paragraph (1) of the United States proposal, by replacing the words "his or her command" by "such command". With that amendment, a mere administrative commander would be reduced to the level of a civilian superior, whose responsibility was covered by paragraph (2) of the United States proposal.

72. **Mr. SADI** (Jordan) expressed support in principle for the main thrust of the United States proposal, commenting that it was necessary to draw a distinction between the *de jure* and de facto responsibility of civilian superiors. The hierarchy of civilian superiors could extend as far as the head of State, and the latter could not be made accountable for an act of which he had no knowledge or for which he did not have direct responsibility. In that connection, there was an inconsistency between the introductory part of paragraph (2) of the United States proposal, which presumed that the superior was directly privy to the act in question, and subparagraph (b) of that paragraph which spoke of crimes within the official responsibility of the superior.

73. **Mr. NATHAN** (Israel) said he supported the United States proposal in principle, on the assumption that responsibility for the crimes in question should attach equally to military commanders and civilian superiors. Regarding the content of the proposal, he suggested the insertion of the words "or ought to have known" after "knew" in paragraph (2) (a), thereby establishing the principle that a superior not only had actual knowledge but also what he would term "constructive" knowledge, in other words, being equally responsible for failing to appreciate facts which he or she was in a position to know. He further suggested that the word "activities" in paragraph (2) (b) should be replaced by "acts or omissions" because, in the criminal sphere, an omission might be just as criminal as an act itself.

74. **Ms. WILMSHURST** (United Kingdom) expressed support for the general thrust of the United States proposal. Her delegation had some detailed substantive points to raise, but hoped that they could be considered in the working group. It supported the proposal of the Netherlands to replace "intending" by "about".

75. **Mr. PENKO** (Slovenia) supported the replacement of the original article 25 by the United States proposal. He sought clarification as to whether the criteria listed in paragraphs (2) (a), (b), (c) and (d) were cumulative in establishing the criminal responsibility of a civilian superior, or whether they were alternatives.

76. **Mr. DIVE** (Belgium) said he supported the United States proposal in principle as a useful compromise suggestion to those delegations, including his own, which favoured equal responsibility for military commanders and civilian superiors. He would reserve his technical comments for the working group discussion.

77. **Mr. HU Bin** (China), while expressing appreciation to the United States for its proposal, urged a prudent approach to article 25, bearing in mind the very specific conditions that should attach to attributing criminal responsibility to commanders in accordance with the principles of criminal justice. The criminal responsibility of commanders derived from the tribunals resulting from the Second World War, when it had been relatively simple to assess the responsibility of military commanders who clearly had effective control. His delegation was not in favour of expanding the criminal responsibility of commanders to civilian superiors. It would be very difficult, for instance, to make any judgement on the criteria set forth in paragraphs (2) (b) and (c) of the United States proposal. Although precedents for references to the responsibility of superiors existed, for instance in the Statutes of the two ad hoc Tribunals, they must be seen in a limited time and space context and concerned situations of armed conflict; the word "superiors" in that context could therefore be unambiguously understood as referring to military commanders.

78. **Mr. DRONOV** (Russian Federation) said that the United States proposal deserved support for adopting the idea of a differentiated approach to military commanders and civilian superiors; the proposal could serve as a useful basis for discussion in the working group.

79. **Ms. LE FRAPER DU HELLEN** (France) said that the United States proposal was a step in the right direction and constituted an excellent basis for consideration in the working group. The responsibility of hierarchical superiors should cover both military and civilian authorities.

80. **Ms. FLORES** (Mexico), commending the United States proposal for further discussion in the working group, said that criminal responsibility should be extended to civilian superiors while differentiating between them and military commanders. Blanket responsibility could not be ascribed to civilian superiors; a direct link must be established between the superior and the person committing the crime in question.

81. **Ms. RAMOUTAR** (Trinidad and Tobago) expressed support in principle for the United States proposal. Her delegation would comment further in the course of the working group's discussions.

82. **Mr. JENNINGS** (Australia) drew attention to the need to bear in mind the work of the ad hoc International Criminal Tribunal for the former Yugoslavia, its Statute and the proceedings undertaken in respect of certain persons, specifically Mr. Karadjic and Mr. Mladic. The question had arisen in that Tribunal of the responsibility of a civilian, Mr. Karadjic, and of indictment on the basis of the responsibility of a superior under the relevant article of the Statute of that Tribunal. That raised a point that must be addressed in the working group, namely, a situation in which civilians were effectively part of a command structure that involved military or paramilitary forces. The question did not concern a straightforward civilian bureaucracy, but civilians at a high level who were

in fact engaged in the command or control of lethal forces. It was important that, in providing for the responsibility of superiors, the drafters of the Statute should not omit the possibility of dealing with such persons. With that comment, he welcomed the United States efforts in submitting its proposal.

83. **The CHAIRMAN** summed up the discussion, from which it emerged clearly that article 25 was now ready for detailed discussion in the working group.

The meeting rose at 1.10 p.m.